STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from Michigan Court Of Appeals
Hon. M.J. Kelly, P.J., Wilder, and Fort Hood, JJ.

EARL H. ALLARD, JR.,

Plaintiff/Appellant,

vs

CHRISTINE A. ALLARD,

Defendant/Appellee.

Supreme Court No. 150891

COA No. 308194

Wayne Circuit Court
LC No. 10-110358-DM

PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal. The Court of Appeals decision was entered December 18, 2014. Plaintiff filed his application within 42 days pursuant to MCR 7.302(C)(2)(b), on January 23, 2015. This Court granted leave on June 10, 2015.

STATEMENT OF QUESTIONS INVOLVED

I. DOES A VALID ENFORCABLE ANTENUPTIAL AGREEMENT CONTROL THE DETERMINATION AND DISPOSITION OF MARITAL ASSETS AND HAVE SUPREMACY OVER LEGISLATIVE ENACTMENTS ADDRESSING THE SAME WHEN THERE IS NO LEGISLATIVE INDICATION THAT THE STATUTES CANNOT BE WAIVED BY CONTRACT?

Plaintiff/Appellant answers "Yes"

Defendant/Appellee answers "No"

The trial court answered "Yes"

The Court of Appeals answered "Yes"

II. DID THE COURT OF APPEALS COMMIT CLEAR ERROR WHEN IT RAISED UNPRESERVED AND UNBRIEFED ISSUES TO FIND THAT PROPERTY OWNED BY LIMITED LIABILITY COMPANIES CONSTITUTED MARITAL ASSETS OUTSIDE THE ANTENUPTIAL AGREEMENT AND THAT INCOME BECAME A MARITAL ASSET?

Plaintiff/Appellant answers "Yes"

Defendant/Appellee did not address this issue

The trial court did not address this issue

The Court of Appeals answered "No"

INTRODUCTION

This case is before the Court on leave granted. The application for leave to appeal identified a single issue:

> "It was clear error for the Court of Appeals to rule that the LLCs were not owned by plaintiff in his individual name, that assets owned by the LLCs could be regarded as part of the marital estate, and that income earned by plaintiff became a marital asset." (Plaintiff/Appellant's Application for Leave to Appeal, p 10.)

When granting leave, this Court directed the parties to include in their briefs the following two issues:

> "Whether MCL 552.23 and MCL 552.401 are inapplicable where the parties entered into an antenuptial agreement," Order granting leave dated June 10, 2015; and
>
> "Whether the real estate held by the plaintiff's limited liability companies, including the marital home, and any income generated by those properties, could be treated as marital assets and, if so, under what conditions." *Id.*

Issue I of this brief addresses the applicability of the two statutes when an enforceable antenuptial agreement exists. Issue II addresses the Court of Appeals decision directing the trial court to consider invading assets of limited liability companies as part of the divorce's property distribution.

The following appendices accompany this Brief:

1 Trial court docket printout (Appx 1a)

2 Court of Appeals docket printout (Appx 12a)

3 Antenuptial agreement (Appx 20a)

4 Order granting summary disposition on validity of agreement (Appx 27a)

5 Opinion and Order re: issues in divorce (Appx 34a)

6 Judgment of Divorce (Appx 55a)

7 Court of Appeals opinion (Appx 67a)

8 M Tr 8/8/2011 (motion for summary disposition) (Appx 84a)

9 Tr 8/17/2011 (motion in limine; testimony – James R. Graves) (Appx 94a)

10 Tr 8/18/2011 (testimony – Earl Allard) (Appx 107a)

11 Tr 9/8/2011 (argument re: scope of proofs) (Appx 129a)

12 Tr 9/14/2011 (testimony – Christine Allard) (Appx 141a)

STATEMENT OF FACTS

The Court of Appeals accepted the trial court's determination that the antenuptial agreement was valid and enforceable. Because this case has evolved pursuant to the Supreme Court's order granting leave, the factual background will not be stated in the level of detail contained in the plaintiff's Court of Appeals brief (where the facts were detailed at pages 1-13, including details of the summary disposition motion). The summary disposition order finding the agreement valid and enforceable is attached, however, as Appx 27a. The discussion in this brief will instead focus on the trial proofs and how the validity of the antenuptial agreement affected the trial court's application of the two statutes identified in this Court's leave order. In other words, this brief starts with the presumption that the antenuptial agreement was valid and enforceable (as the circuit and Appeals courts held), a position that has been neither cross-appealed nor negated by the language of this Court's leave order.

A. Trial Proofs

The proofs showed that the antenuptial agreement provided that each party would bring

their premarital property into the marriage free and clear of any claim by the other (Antenuptial Agreement, ¶¶ 3 & 4, Appx 20a-21a); property inherited from the parents of the respective parties would be non-marital property held by the individual party (*id*. ¶ 9, Appx 22a); and, most important to this appeal, each party was entitled to obtain property in his or her individual name *during* the marriage, and that property would similarly be considered individual property outside of the marital estate:

> Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name. (Antenuptial Agreement, ¶ 5(b), Appx 21a-22a).

The agreement also provided that any increase in the value, rents, profits or dividends of pre-marital assets would be individual property (*id*. ¶ 5(a), Appx 21a). It also confirmed that it was the complete agreement between the parties (*id*. ¶¶ 3, 12, Appx 20a-21a, 23a), the parties were entering into the agreement freely and voluntarily (*id*. ¶ 11(c), Appx 23a), each party had an opportunity to consult with an attorney (*id*. ¶ 11(a), Appx 22a-23a), and each had weighed their options before signing the agreement (*id*. ¶ 11(b), Appx 23a).

The circuit court had ruled that the antenuptial agreement was valid and enforceable (M Tr 8/8/2011 pp 36-44, Appx 85a-93a). Thus, on the first day of trial plaintiff argued a motion in limine to restrict the proofs to the issue of the title ownership of assets, rather than conducting a full trial into the nature of assets and how they should be divided under normal equitable principles. Defendant responded that two statutes – MCL 552.401 and MCL 552.53 – would allow the court to contradict the express terms of the antenuptial agreement and place property into the marital estate due to the insufficiency of the marital estate as it currently stood.

Defendant conceded that she was unable to find any case in Michigan *or in any other state* that would allow the court to engage in this process (Tr 8/17/2011 p 17, Appx 95a). Defendant further conceded that the only case addressing this issue instead found that a trial court had erred by failing to enforce the antenuptial agreement (*id*. pp 17-18, Appx 95a-96a).

After taking a recess to consider the arguments, the court granted the motion in limine in part and denied it in part, ruling:

> I do agree with plaintiff's attorney, that the existence of this valid prenuptial agreement does effect [*sic* – affect] and govern the distribution of the properties in this case. However, I disagree that the testimony at trial should be limited only to the distribution of personal property and the calculation of child support. Like any other divorce case, one which would not involve a antenuptial agreement, this court must first identify, through testimony and documentary evidence, the separate and marital properties of the parties. However, because we have a valid antenuptial contract here, the scope of that direct testimony and cross-examination will be limited, in terms of relevancy, by the terms of the contract. So, we'll proceed in that fashion. I hope you understand what I just ruled.
>
> *Ms. Tobin-Levigne* [for defendant]: No, your honor. I'd ask for clarification.
>
> * * *
>
> *The Court*: Well, I believe that at trial I need to hear – I need to hear testimony about the assets, the separate assets of the party, that they brought to the marriage, and identifying those, the marital assets that were acquired during the marriage, or the assets that were acquired during the marriage. I believe that the other side will be able to cross-examine on that, identifying those items. Those that have been identified and distributed, whether or not there's a prenup or not. The scope will be governed by the contract. How was it titled? But I have to identify the property of the parties, and I'll allow cross-examination on that. I can't just – unless we have a stipulation of what the properties are and how they're titled, then we don't have to go through that, but I don't think we have that, because I haven't seen that as a stipulation. Now, do you understand?
>
> *Ms. Breitmeyer:* I think so.
>
> *The Court:* Do you understand?
>
> *Ms. Tobin-Levigne:* Your Honor, is your ruling just on identifying what's in a –
>
> *The Court:* What the property is.

Ms. Tobin-Levigne: In whose name is it in?

The Court: Well, the contract governs the distribution, as I see it. But if you're making any claim about any particular property, you can do it at trial with your cross-examination. I don't know that you are. But if you are, you have that right to do so, to do at trial.

Ms. Breitmeyer: So, is it the court's ruling that if Ms. Tobin believes there is something that is marital, that she has the right to question both her client and cross-examine my client on –

The Court: Yes. You have to put on your case. An you have to identify the property you wish to be distributed pursuant to the contract, because it's what's governing this case. I found it was a valid contract. I believe it was a valid contract, validly entered into, after hearing the arguments of counsel, reading the Michigan law, and hearing the testimony.

But I also believe that in order to – I can't just have a trial unless there is a stipulation as to where everything is going, I have to know where everything – what you have, and what has to be divided. The contract is going to govern my ruling in the end. But if you're claiming that some of these items may be marital, or may – you know, applying the contract, then you have your right to pursue that. You have the right to examine that at trial. [Tr 8/17/2011 pp 35-38, Appx 98a-101a.]

During trial, as testimony proceeded, a dispute arose whether the defendant's cross-examination of the plaintiff had exceeded the proper scope of relevant evidence. In particular, defendant desired to continue examining Mr. Allard about the source of funds from which assets had been acquired – did the money come from marital funds or from outside the marriage? Tr 9/8/2011 p 5. Defendant had earlier denied that she had any evidence that the assets were acquired with marital funds:

The Court: [D]o you have evidence through your discovery that any of the marital – or any of the assets that were acquired during the marriage were secured with marital funds?

Ms. Tobin-Levigne: We don't. Your Honor, we don't have – my client was completely amputated from the financial matters of this marriage. I think the court has gleaned that. We have no evidence. . . . [Tr 8/17/2011 p 19, Appx 97a.]

Cognizant of this, the court inquired during trial whether any additional proofs would be offered. Defendant offered only a brief summary of anticipated evidence from the defendant herself: she denied signing any deeds that would have waived any dower interest (Tr 9/8/2011 pp 12-13, Appx 132a-133a).

Defendant filed a brief outlining why the scope of examination should be broad, and plaintiff renewed his motion in limine to restrict the evidence (*id*. pp 4-5, Appx 130a-131a). Boiled to its essential terms, defendant argued that titling an asset in Mr. Allard's name alone was not dispositive, and Mr. Allard would also have to show that the asset was acquired without the involvement of marital funds (Tr 9/8/2011 p 19, Appx 135a). After taking a recess to consider the arguments, the court decided it "will stand by its previous ruling and allow the cross-examination to proceed" and to "allow the cross-examination of Mr. Allard in that regard, limiting it to the inquiries regarding any transfer of title, and the actual deeds themselves" (*id*. pp 21-22, Appx 137a-138a). Clarifying, the court stated that "any of the properties that were acquired after they were married you can inquire about here as to how they were titled and how they were conveyed during the marriage, I'm going to allow that" (Tr 9/8/2011 pp 26-27, Appx 139a-140a). In summary, the court allowed inquiry into the nature of the assets and how they were titled, which included defendant's suggestion that her signature had been forged. Indeed, Ms. Allard testified that her signature was applied without her knowledge to certain deeds and tax returns. See Tr 9/14/2011 pp 91-92, Appx 142a-143a.

Much of the trial focused on the nature of the assets and in what manner they were titled for ownership. The testimony showed that plaintiff Earl Allard owned single-member LLCs, which in turn owned various business properties as rental properties or as part of health-care

companies (see, e.g., Tr 8/18/2011 pp 13, 39, Appx 108a, 115a). The LLCs[1] were organized during the marriage (2000 to 2008) and held as single-member LLCs in Mr. Allard's individual name (testimony of accountant James R. Graves, Tr 8/17/2011 p 73, Appx 103a; testimony of Earl Allard, Tr 8/18/2011 pp 13-14, Appx 108a-109a). Mr. Allard and Mr. Graves testified that Mr. Allard created and operated the LLCs (testimony of Earl Allard, Tr 8/18/2011 pp 13-15, Appx 108a-110a; testimony of accountant James R. Graves, Tr 8/17/2011 p 73, Appx 103a). Mr. Allard specifically testified:

> *Q.* I've handed to you these exhibits [Plaintiff's exhibits 8 and 13]. Could you identify those please, Mr. Allard?
>
> * * *
>
> *A.* Articles of Organization that were filed through the State of Michigan forming the LLCs.
>
> *By Ms. Breitmeyer:*
>
> *Q.* Okay. And say which LLC's.
>
> *A.* There is Grosse Pointe Properties.
>
> *Q.* And when was that formed, Mr. Allard?
>
> *A.* February 2, 2000 – February 28, 2000.
>
> *Q.* Okay. And is that a single member LLC?
>
> *A.* It is.
>
> *Q.* And are you the single member?
>
> *A.* Yes.
>
> *Q.* Okay. Could you identify the next document?
>
> *A.* Eastpointe Apartment Group.
>
> *Q.* And is that a single member LLC?

[1] Eastpointe Transitional Living LLC, Grosse Pointe Properties LLC, Eastpointe Transportation LLC, Eastpointe Apartment Group LLC, and New Detroit REO LLC.

A. Single member.

Q. And are you the single member?

A. Yeah. Right on here it says, name of resident agent, Earl H. Allard, Jr.

Q. Okay. You're also the registered agent. Now, when was that established, Mr. Allard?

A. 2-18-2005.

Q. Okay. And would you identify the next document, please, in [exhibit] 13?

A. Eastpointe Transitional Living. 3-23-05.

Q. So, 2005, is that what you're saying?

A. Right.

Q. Okay. And is that a single member LLC?

A. Yes.

Q. All right. Are you the single member?

A. Yes.

Q. All right. And what is the next document?

A. Eastpointe Transportation.

Q. And when was that established?

A. July of 2005.

Q. And is that a single member LLC?

A. Yes.

Q. And are you the single member?

A. Yes.

Q. Al right. And is there a final one?

A. Yeah. New Detroit REO.

Q. Okay. And is that a single member LLC?

A. Yeah.

Q. Are you the single member?

A. Yes.

* * *

Q. . . . And when was that established?

A. 3/14/2008.

Q. 3-14-2008, all right. And do [*sic* – did] you cause the tax returns to be filed in the fashion Mr. Graves described as the sole owner of those each year?

A. Yeah. [Tr 8/18/2011 pp 13-15, Appx 108a-110a.]

Mr. Allard further testified about various real estate transactions. Some of the properties were rental properties acquired in his sole name and eventually transferred to LLCs. See Tr 8/18/2011 pp 38, 41-43, 45-49, Appx 114a, 117a-119a, 121a-125a). Two buildings were acquired by Eastpointe Transitional Living, LLC, through its own funds and in its own name (*id*. pp 35-37, 50-51, Appx 111a-113a, 126a-127a). Others were acquired directly by Grosse Pointe Properties in its name (*id*. pp 49-50, 52, Appx 125a-126a, 128a).

B. Judgment of Divorce

Following a four-day bench trial, the circuit court issued a Judgment of Divorce awarding the parties individually all property that had been held in their individual capacities, with the bulk of the property being awarded to plaintiff (see Judgment of Divorce, ¶ 30(a), Appx 61a). Defendant did not challenge in the Court of Appeals that the property was actually held in another fashion (such as being titled in the wife's name, or jointly). Defendant argued, though, that the circuit court should have taken the property in the husband's sole name and placed it in a marital estate to be divided in a manner contrary to the terms of the antenuptial agreement.

The court also awarded child support (Judgment of Divorce, ¶ 19, Appx 60a). The award would have been calculated as $3,093 per month (for two minor children) pursuant to the child support guidelines (*id*. ¶ 16, Appx 59a).[2] The court opined that this amount would not be fair under the child support guidelines and in light of the property division:

> 17. This court, in its discretion and in considering the particular facts of this case, finds that the application of the child support formula would be both unjust and inappropriate because the amount awarded under the formula is insufficient to provide these children with a comparable home and lifestyle after the divorce and thus, is not in their "best interests." 2008 MCSF 1.04(E)(18).
>
> 18. In distributing the couple's property pursuant to the antenuptial agreement, the net value of Husband's separate estate exceeds $900,000 while Wife's is approximately $95,000, virtually all of which are nondisposable funds. Further, under the contract, Husband is awarded *all* of the real and business property acquired during this marriage, as well as the pre-marital home on Bedford, in which the parties have lived and shared with their children throughout the marriage. In fact, Wife has been living in the Bedford home with the children during the pendency of this divorce case. Because Wife will retain (by consent) sole physical custody of the minor children, it is undisputed that Wife will have to move and provide a new home for the children after the divorce. Based on the uncontroversial [*sic* - uncontroverted] evidence and property distribution in this case, Wife has limited available resources from which to finance and maintain her children's relocation. Thus, the court will deviate from the child support formula and increase the amount of monthly child support by $1,000. [Judgment of Divorce, ¶¶ 17-18, pp 5-6, Appx 59a-60a.]

Accordingly, the court added $1,000 per month to the child support award, for a total monthly child support obligation (two children) of $4,093.

C. Court of Appeals

Defendant wife appealed the judgment as a matter of right. After full briefing and oral argument, the Court of Appeals issued its published opinion on December 18, 2014 (Appx 67a).

[2] The child support guidelines first yielded a total of $3,041 for two children (Judgment of Divorce,¶ 16, Appx 59a), but the court recalculated the amount and changed it to $3,093 (*id*. ¶ 19, Appx 60a).

It rejected the defendant's arguments that the antenuptial agreement was voidable as the product of duress (Opinion, p 8, Appx 74a), it rejected her claims that alleged abuse constituted a "changed circumstance" to void the agreement (*id*. p 6, Appx 72a), and it found that the agreement was not procedurally or substantively unconscionable (*id*. p 9, Appx 75a). The court also found that the trial court did not err when it determined that two divorce statutes (MCL 552.23 and MCL 552.401) did not require the court to ignore the terms of the antenuptial agreement when dividing property (Opinion, p 13, Appx 79a).

After upholding the agreement, the Court of Appeals injected an unpreserved and unbriefed issue questioning whether the assets of the LLC became marital property since they were titled in the name of the LLC.[3] By the court's reasoning, if the assets were titled in the name of the LLC that acquired them, they were not – by definition – titled in the name of Earl Allard and therefore were not excluded from the antenuptial agreement's provision that assets acquired in an individual's name would remain individual property (Opinion p 15, Appx 81a). The court stated that "the LLCs created by plaintiff during the course of the marriage were not acquired in plaintiff's individual capacity or name." Opinion p 17, Appx 83a. That finding forms the basis for Issue II, as plaintiff maintains this finding was clearly erroneous. While cautioning against piercing the corporate veil, the Court of Appeals nonetheless remanded the case to the circuit court to determine whether income earned by Earl Allard in his own name was used to purchase LLC assets (Opinion p 17, Appx 83a).

D. Supreme Court

Plaintiff applied for leave to appeal, arguing that the Court of Appeals' reliance on an

[3] The court stated that this was defendant's argument, Opinion p 13 (Appx 79a), but it was not.

unpreserved and unbriefed issue constituted substantive and procedural error. As noted earlier, this Court granted leave to appeal and directed the parties to include among the issues briefed whether the two statutes should be considered when an antenuptial agreement exists, and whether property owned by the LLCs could be treated as marital assets. The Court also invited *amicus* briefs from the Family Law and Business Law sections of the State Bar of Michigan.

Additional facts specific to the issues may appear in the discussion.

ARGUMENT

I. A VALID ENFORCABLE ANTENUPTIAL AGREEMENT THAT CONTROLS THE DETERMINATION AND DISPOSITION OF MARITAL ASSETS HAS SUPREMACY OVER LEGISLATIVE ENACTMENTS ADDRESSING THE SAME WHEN THERE IS NO LEGISLATIVE INDICATION THAT THE STATUTES CANNOT BE WAIVED

Standard of Review: The applicability of a statute is a question of law reviewed de novo. *Miller v Mercy Memorial Hosp,* 466 Mich 196, 201; 644 NW2d 730 (2002).

Discussion:

A. The history of antenuptial agreements supports their validity

Antenuptial agreements made their first appearance in Michigan jurisprudence as a way to waive dower rights upon the husband's death. See, e.g., *Detroit Trust Co v Baker*, 230 Mich 551, 556; 203 NW 154 (1925) (antenuptial agreement valid). Antenuptial agreements waiving dower were routinely upheld. Michigan statutes posed no obstacle, even though the statutes allowing waiver of dower did not expressly confront this issue. Rather, the statutes allowed waiver before marriage if a "jointure" were signed.[4] Under the Michigan statutes, the jointure would have to create a freehold estate in the land for the wife's benefit:

> A woman may also be barred of her dower in all lands of her husband, by a jointure settled on her with her assent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect in possession or profit immediately on the death of the husband. [1857 C.L. § 2785.]

[4] A jointure is an agreement that provides for a widow's financial security. See *Black's Law Dictionary* (5th ed 1979), p 753. It generally involves at least a life estate. *Vance v Vance*, 21 Me 364, 368, 369 (1842).

That same provision remained in Michigan law for a century and continues today. See MCL 558.14. Despite this requirement, the Supreme Court found that a jointure was not the *only* method to waive a wife's dower interest, and that it could also be waived via an antenuptial agreement:

> Complainant contends that the contracts do not constitute a legal jointure or pecuniary provision under [1897] C.L. §§ 8931, 8932, and 8933. This may or may not be true; and it is immaterial whether it be true or not. The fact that the law provides by statute a method of barring dower by jointure does not deprive the intended wife of the power to bar her dower by any other valid form of antenuptial contract.
>
> Where the parties entering into an antenuptial contract are of mature years and have a full understanding of the meaning of the instrument, the agreement, if based on a sufficient consideration, and in the absence of fraud, is valid and enforceable, and is not against public policy. Marriage alone has been held a sufficient consideration to support a marriage settlement.
>
> In this case, however, there is another consideration. There is a mutual agreement on the part of each to waive all interest in the property of the other. This constitutes a good consideration. [*Hockenberry v Donovan*, 170 Mich 370, 379-380; 136 NW 389 (1912) (citations omitted).]

Thus, while statutes provided a manner to waive dower, they did not provide the only manner. Contracts were an equally effective option.

Antenuptial agreements were later employed to control the distribution of property in a divorce. Their use in divorce was not entirely assured, though, as courts held that they would be against public policy if the agreement "promoted" divorce. *Rinvelt v Rinvelt*, 190 Mich App 372, 379-381; 475 NW2d 678 (1991).

The development of no-fault divorces signaled a change in public attitudes, and while the courts imposed new protections on antenuptial agreements, the courts shifted their inquiry away from the slippery concept of whether an agreement encouraged parties to divorce and instead focused on whether "the facts and circumstances are so changed since the agreement was

executed that its enforcement would be unfair and unreasonable." *Reed v Reed*, 265 Mich App 131, 142; 693 NW2d 825 (2005). An antenuptial agreement could be declared invalid under very narrow circumstances:

> [I]t is now well established that prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan. *Booth* [*v Booth*, 194 Mich App 284; 486 NW2d 116 (1992)]; *Rinvelt, supra* at 382, 475 NW2d 478; see, also, MCL 557.28. But such agreements may be voided if certain standards of "'fairness'" are not satisfied. *Rinvelt, supra* at 380-381, 475 NW2d 478, quoting *Brooks* [*v Brooks*, 733 P2d 1044, 1049 (Alas, 1987)] A prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable. *Rinvelt, supra* at 380, 475 NW2d 478, citing *Brooks, supra* at 1049. A party challenging a prenuptial agreement "bears the burden of proof and persuasion." *Rinvelt, supra* at 382, 475 NW2d 478. [*Reed*, 265 Mich App at 142-143.]

Thus, to avoid the unambiguous terms of this antenuptial agreement, defendant had the burden of proving that (1) the agreement was obtained through fraud, duress, mistake, or misrepresentation; (2) the agreement was unconscionable *when executed*; or (3) the facts and circumstances have changed so much that it would be unfair and unreasonable to enforce the contract. Even this third factor has limits, as the court's inquiry depends on whether the changed circumstances were foreseeable before or at the time the agreement was made. *Woodington v Shokoohi*, 288 Mich App 352, 373; 792 NW2d 63 (2010). Nonetheless, this power to invalidate antenuptial agreements (which parallels court decisions involving other types of contracts) does not give a trial court the discretion to void an antenuptial agreement merely because the agreement is not subjectively "fair" in the court's eyes. As stated in *Reed*, "[t]his approach precludes the judiciary from substituting their own subjective views of 'fairness' contrary to an express written agreement." *Reed v Reed*, 265 Mich App at 144.

The shifting view of antenuptial agreements occurred through the evolution of society's beliefs and attendant case law, not via statutory enactments.[5] In fact, the only statutory enactment controlling antenuptial agreements is the simple acknowledgment of their validity found in MCL 557.28:

> A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place.

B. Trial courts traditionally have broad authority to resolve property issues

A judgment in a divorce action is called upon to divide the marital property between the two parties to the divorce, and the trial court must generally classify the property as "marital" or "separate." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). "Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage." *Id*. at 201.

In an ordinary case *without an antenuptial agreement*, a trial court is given authority to reach what it regards as an equitable result in light of the circumstances of the case. *Cunningham*, *id*. The trial court must "consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance." *Woodington*, *supra* at 363 . Still, appellate courts give a wide berth to trial courts, although the precise terms of review have been difficult to define:

> To alleviate any possible confusion stemming from our prior cases, we hold here that the appellate standard of review of dispositional rulings is not limited to clear error or to abuse of discretion. The appellate court must first review the trial

[5] Of course, the shift to no-fault divorce was reflected in statutory changes, See 1971 PA 75. Those statutes did not expressly address antenuptial agreements.

> court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable. [*Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992) (footnotes and citations omitted).]

Although *Sparks* was decide in 1992, how many antenuptial agreements were signed when this Court operated under the more deferential "abuse of discretion" standard? See *Wills v Wills*, 330 Mich 448, 456; 47 NW2d 687 (1951); *Wojcik v Wojcik*, 375 Mich 616, 618; 134 NW2d 740 (1965). Shifting standards of review can also drive parties to the greater certainty contracts provide.

No matter how "inequitable" is defined in a particular case, there can be no disagreement that *Sparks* preserved a very deferential standard on appeal and an aggrieved party has only a slight chance of obtaining appellate relief on questions decided under that standard. In other words, the luck of the draw when a trial judge is selected may well define the outcome of the divorce, and there will be no effective check on that power. On the other hand, antenuptial agreements allow the parties to "ensure predictability, plan their future with more security, and, most importantly, and decide their own destiny." *Rinvelt*, 190 Mich App at 382, quoting with approval *Brooks v Brooks*, *supra*, and *Gant v Gant*, 329 SE2d 106, 112-113 (W Va, 1985).

C. Contracts are to be interpreted as written

Since a trial court is instructed to be "equitable," what exactly is "equity"? Law books will define it as "equal and impartial justice as between two persons whose rights or claims are in conflict" (*Black's Law Dictionary* (4th ed 1951), p 634) and "fairness; impartiality; evenhanded dealing" (*Black's Law Dictionary* (7th ed 1999), p 560). Standard dictionaries will similarly

suggest it is "fairness; impartiality; justice" (*Webster's New World Dictionary, Concise Edition*, p 254 (The World Publishing Co, 1959)) and "justice according to natural law and right" (*Webster's Ninth New Collegiate Dictionary*, p 421 (Merriam-Webster, Inc, 1985)). *What could be more equitable than letting two adults – and not a stranger – decide their own fate through a contract?*

The right of parties to make contracts is not to be taken lightly; this right has been held to be a fundamental right, free from second-guessing by the judiciary. As Justice Markman stated for this Court in *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007):

> The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 US 3, 22; 3 S Ct 18; 27 L Ed 835 (1883). We "respect[] the freedom of individuals freely to arrange their affairs via contract" by upholding the "fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*," unless a contractual provision "would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 468, 470; 703 NW2d 23 (2005) (emphasis in original). As one court has stated:
>
> > Courts do not make contracts for parties. Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways. [*Rarities Group, Inc v Karp*, 98 F Supp 2d 96, 106 (D Mass, 2000).]
>
> "'Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains . . . .'" *Fed Deposit Ins Corp v Aetna Cas & Surety Co*, 903 F2d 1073, 1077 (CA 6, 1990), quoting *St Paul Mercury Ins Co v Duke Univ*, 849 F2d 133, 135 (CA 4, 1988). Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract." *Rich Products Corp v Kemutec, Inc*, 66 F Supp 2d 937, 968 (ED Wis, 1999). Rather than attempt to apply an abstract notion of "justice" to each particular case arising out of a contract, we recognize that refusal to enforce a contract is "contrary to the real

> justice as between [the parties].” *Mitchell v Smith*, 1 Binn 110, 121 (Pa, 1804). See also *Brown v Vandergrift*, 80 Pa 142, 148 (1875) (holding that enforcing a contract is “essential to do justice”). Consequently, when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not “contrary to public policy.” *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). When contracts are formed, the parties to the contract are the lawmakers in such realm and deference must be shown to their judgments and to their language as with regard to any other lawmaker. [479 Mich at 211 (footnote omitted).]

Recognizing this fundamental right, Michigan appellate courts have repeatedly held that unambiguous contracts must be enforced as written:

> Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express terms of contracts. See, e.g., *Mann v Pere Marquette R Co*, 135 Mich 210, 219; 97 NW 721 (1903), citing *Baltimore & O S R Co v Voigt*, 176 US 498, 504; 20 S Ct 385; 44 L Ed 560 (1900) (“[T]he usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy . . . .”). [*McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008).]

See also *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) (“unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written”); *Harbor Park Market, Inc v Gronda*, 277 Mich App 126; 743 NW2d 585 (2007), *lv den* 481 Mich 851 (2008) (“The goal of contract interpretation is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement”).

D. <u>The rules of contract interpretation apply to antenuptial agreements</u>

Antenuptial agreements are recognized by statute, MCL 557.28 (“A contract relating to property made between persons in contemplation of marriage shall remain in full force after

marriage takes place"), and enjoy a presumption of validity, *Rinvelt v Rinvelt*, 190 Mich App at 382. In addition, the Court of Appeals has recognized that, like most other contracts, the general rules of contract construction should apply. *Reed v Reed*, 265 Mich App at 145. See, generally, 41 Am Jur 2d Husband and Wife, § 89. Therefore, an unambiguous agreement is entitled to enforcement without judicial construction. *Id*.

E. MCL 552.53 & MCL 552.401 should not apply to invalidate a contract

On the first day of trial, plaintiff argued a motion in limine to restrict the proofs at trial. Defendant responded that the two statutes involved here – MCL 552.401 and MCL 552.53 – would allow the court to contradict the express terms of the antenuptial agreement and place property into the marital estate due to the insufficiency of the marital estate as it currently stood. Defendant conceded that she was unable to find any case in Michigan *or in any other state* that would allow the court to engage in this process (Tr 8/17/2011 p 17, Appx 95a). Defendant further conceded in the trial court that the only case addressing this analysis (*Reed v Reed*) ultimately concluded that a trial court had erred by failing to enforce the antenuptial agreement (Tr 8/17/2011 pp 17-18, Appx 95a-96a).

The statutes give a circuit court in divorce cases permissive authority to adjust a property division for equitable purposes, and to invade the personal estate of a divorcing party to satisfy the award:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the

> real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party. [MCL 552.401.]
>
> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. [MCL 552.23(1).]

Defendant conceded that all the affected assets acquired during the marriage were titled in Mr. Allard's sole name (Tr 8/17/2011 p 18, Appx 96a) and that any argument she had would be limited to the fact that Ms. Allard never released her dower interest in any of that property. Defendant also conceded that she had no evidence that any of the property was acquired with marital funds (*id*. p 19, Appx 97a). No further offer of proof was made.[6]

Defendant will argue here, as she did below, that MCL 552.23 and MCL 552.401 apply even if the parties have signed an antenuptial agreement distributing the property. She relied below on *Reed v Reed*, which addressed (albeit in dicta) whether those statutes apply when a valid antenuptial agreement is present.[7]

The key decision in *Reed* was the Court of Appeals' determination that the circuit court erred by failing to enforce an antenuptial agreement that defined which assets would be part of the marital estate and which assets would be separate property. The court determined that the matter had to be remanded for enforcement of the agreement, but added this commentary:

[6] While this case has now evolved to include the LLCs, the LLCs were also owned solely by Mr. Allard. Of course, the LLCs in turn owned property, and that property was held in the respective LLCs' sole names.

[7] The Court of Appeals docket computer shows no further appeal to this Court in the *Reed* case.

> Because the trial court erred by not enforcing the parties' prenuptial agreement, it also erred in the first step necessary to equitably divide the parties' property: determining what property is included in the marital estate and what property is separate property of a party. "[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The trial court's not enforcing the parties' prenuptial agreement clearly affected the segregation of marital and separate property. Accordingly, we must remand for further proceedings. *Nevertheless, because defendant's arguments regarding the marital estate will again arise, we will briefly address them*. [265 Mich App at 150-151 (emphasis added).]

Later in the Opinion, the *Reed* court addressed property in Oakland County and historical papers, and stated that the circuit court had erred in declaring them to be marital assets "without factual findings that one of the two statutory exceptions permitted invasion of separate property was applicable." 265 Mich App at 156.

Allowing a court to apply the statutes in the face of an antenuptial agreement would be another way of using general equitable principles to decide a case that is already controlled by contract law. It would also contradict a principle that guided the *Reed* court elsewhere in its analysis: "it necessarily follows that parties who negotiate and ratify antenuptial agreements should do so with the confidence that their expressed intent will be upheld and enforced by the courts." *Reed*, 265 Mich App at 146. An open-ended trial would defeat the purpose of allowing parties to settle their differences ahead of time, and would eliminate the certainty that results from a contractual resolution. An antenuptial agreement that must still be tried for general fairness does not save time and does not provide certainty. Allowing a full inquiry into the results of such a contract would defeat the public policy that permits antenuptial agreements or other contractual resolutions of potential future disputes. It would treat agreements as suggestions, not contracts.

The wording of MCL 552.53 and MCL 552.401 is discretionary ("may"). See generally *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008); *cf* MCL 257.82 (motor vehicle code recognizes "may" as permissive and "shall" as mandatory). As a result, the Legislature has empowered a trial court to consider those statutes, but has not compelled their consideration. Where the parties have agreed in advance to a property division, they have agreed to limit the court's authority should divorce occur. Had the Legislature intended to make these provisions mandatory, it would have adopted the type of compulsory language found in other sections of the divorce law. See, e.g., MCL 552.101(1) (trial court "shall" include disposition of dower in a divorce judgment). Absent a legislative directive removing this freedom, the parties should have the ability to form a contract.[8]

These discretionary statutes fail in comparison to MCL 557.28, which declares unequivocally that antenuptial agreements "shall" (mandatory) remain in "full force." Allowing trial judges to exercise broad powers to negate otherwise valid agreements would run afoul of the "full force" recognized by MCL 557.28 and render its language nugatory. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory").

In addition, liquidated damages provisions are well recognized in the law. An antenuptial agreement serves the same purpose of allowing the parties to take what might be uncertain remedies in the future and "ascertain for themselves, and to provide in the contract itself, the amount of damages which shall be paid for the breach." *Whiting v Village of New Baltimore*,

[8] A mandatory statute would still run afoul of the strong public policy allowing parties to make contracts as discussed by Justice Markman in *Bloomfield Estates*.

127 Mich 66, 71; 86 NW 403 (1901) (enforcing liquidated damages provision in road construction contract). Moreover, parties who settle their disputes are able to includes terms and conditions a court would have been powerless to order, such as conveying property to children. See *Kasper v Metropolitan Life Ins Co*, 412 Mich 232, 238; 313 NW2d 904 (1981). As stated earlier, there are fundamental considerations mandating the recognition of contracts, and cases such as *Kasper* show how far parties may go to resolve their disputes: they may go beyond the authority of courts.

Just as courts have routinely upheld contract provisions that would otherwise exceed a court's authority, the courts have also upheld contracts that change the outcome of statutes, such as those cases upholding contractual limitations periods that are shorter than the statutory period. See *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981). The limitations statute – MCL 600.5807 – nowhere prohibits contracting parties from providing for a different deadline for notice or suit. The Court of Appeals has also held that the right to periodic alimony may be waived by the parties. See *Staple v Staple*, 241 Mich App 562, 568-569; 616 NW2d 219 (2000). The statute allowing periodic alimony is similarly silent on whether it can be waived. See MCL 552.28. Likewise, this Court does not need Legislative pre-approval to continue its solid line of reasoning that contracts are to be interpreted as written, and that antenuptial agreements deserve the same treatment.

Finally, even if the defendant were entitled to more assets, the trial court recognized the financial disparity and awarded more child support to help even the result.

F. Conclusion

Allowing the parties to create their own remedies promotes certainty and stability. The unambiguous contract should be enforced as written.

II. THE COURT OF APPEALS COMMITTED CLEAR ERROR WHEN IT RAISED UNPRESERVED AND UNBRIEFED ISSUES TO FIND THAT PROPERTY OWNED BY LIMITED LIABILITY COMPANIES CONSTITUTED MARITAL ASSETS OUTSIDE THE ANTENUPTIAL AGREEMENT AND THAT INCOME BECAME A MARITAL ASSET

Standard of Review: This Court reviews the Court of Appeals' factual determination for clear error. MCR 7.302(B)(5).

Discussion:

The Court of Appeals found that "the LLCs created by plaintiff during the course of the marriage were not acquired in plaintiff's individual capacity or name." Opinion p 17, Appx 83a. That finding was clearly erroneous and set the stage for a broad remand order that would allow the circuit court to disregard the antenuptial agreement and invade property owned by the LLCs.

A. Limited Liability Companies have a separate legal existence

Although the Court of Appeals suggested that the rules for piercing a corporate veil still apply, the Court applied a presumption that the assets owned by the LLC can be attached as marital property. This is a de facto method for piercing the corporate veil on undisclosed terms, and shifting the burden on plaintiff to defeat the presumption. That move casts great doubt on the standards applicable to "piercing" cases, a problem this Court has noted in prior decisions. See *L&R Homes, Inc v Jack Christensen Rochester, Inc*, 475 Mich 853; 713 NW2d 263 (2006) (dissenting statement of Corrigan, J.) ("I would grant leave to appeal to articulate clear standards for piercing the corporate veil and settle the confused state of Michigan jurisprudence regarding this problem"); *Daymon v Fuhrman*, 474 Mich 920; 705 NW2d 347 (2005) (separate dissenting statements from denial of leave by Chief Justice Taylor and Justices Young and Corrigan).

That ruling also contradicts the manner in which LLCs (or any business entity) operate. It suggests that earnings of an LLC that are put back into the company may be considered commingled assets that have converted into marital assets. Just as importantly, it exceeds how the issues were framed and presented at both the trial court and the circuit court.

The Court of Appeals framed the issue in this fashion:

> We conclude, therefore, that as a matter of law, the LLCs created during the course of the marriage are separate legal entities and *not* to be construed, for purposes of interpreting and applying the plain and unambiguous terms of this antenuptial agreement, as being the same as plaintiff "in his individual capacity or name." Thus, to the extent any real estate properties or other assets were acquired during the course of the marriage by the various LLCs created during the marriage, we find that their disposition in this divorce action is *not* governed by the antenuptial agreement. [Opinion, p 15 (emphasis in original), Appx 81a.]

This is not, however, how the issue was presented at trial. In fact, the defendant stated the following when the trial court was examining the nature of the assets:

> I'm not conceding this is all separate property. Do I have evidence that this property is in any name other than other [sic] the plaintiff and/or an entity? No, I don't, your Honor. But we have entities that were all formed during the marriage, all as a result of – and I have advanced my theories. My client is staying home and allowing Mr. Allard to go out and do what he did. All those other theories are in tandem with [that].
>
> So, is it separate? We don't believe so. Is it in his name? Obviously it is what it is. [Tr 9/8/11 pp 18-19, Appx 134a-135a.]

Thus, defendant proceeded under a theory that she had stayed home, enabling plaintiff to work and build his business, and she was entitled to the LLC's assets under this theory. That is a far cry from the Court of Appeals' approach to this issue. The Court of Appeals has remanded for further hearings into something defendant admitted she had no evidence to support. Defendant further admitted that whether the property was held in Mr. Allard's individual name or in an entity's name, it would have no further consequence. Her theory was that *all* property should be

treated as marital property because she stayed home and raised the children – a position the antenuptial agreement, the law, and the Court of Appeals rejected.

> A limited liability company (LLC) is, under Michigan law,
>
> a business formed by an organizer who may, but need not be a member. It is a business entity separate from its members and liability is limited to the financial contribution made by the member. The members are the owners of the company. The management of the company is carried out by its members, unless the Articles of Organization provide for management by managers. Governance is set forth by the Articles of Organization or operating agreement. [Michigan Dep't of Licensing and Regulatory Affairs website, http://www.michigan.gov/lara/0,4601,7-154-35299_61343_35413_35429-115005--,00.html, retrieved 1/21/2015.]

An LLC has the same powers possessed by a corporation to acquire and dispose of property. See MCL 450.4210.[9] An LLC's tax liability flows through to its members; it does not file its own tax return (testimony of accountant James R. Graves, Tr 8/17/2011 p 70, Appx 102a). The profits are reported on the member/owner's tax returns, on Schedules C and E. *Id*. pp 74, 79, 83 (Appx 104a-106a).

The Court of Appeals properly recognized that an LLC may own property in its name, as happened here. See Opinion, p 15, Appx 81a. It is a separate legal entity and can own property in its name. The Court therefore erred when it treated the LLC as an alter ego of Mr. Allard and chose to potentially bring its assets within the marriage – all while still cautioning that the rules about piercing a corporate veil must be respected (Opinion, pp 16-17, Appx 82a-83a). The court recognized that "[p]iercing the corporate veil of a limited liability company is permissible where there is evidence that the corporate entity (1) is a mere instrumentality of another individual or entity, (2) was used to commit a wrong or a fraud, and (3) caused an unjust injury or loss." Opinion, pp 16-17, Appx 82a-83a. This standard has evolved in the Court of Appeals, see, e.g.,

[9] There is a dearth of reported cases involving the legal aspects of LLCs.

Foodland Distr v Al-Naimi, 220 Mich App 453, 457; 559 NW2d 379 (1997), but has not been endorsed by this Court. See *L&R Homes, Inc*, *supra*; *Daymon*, *supra*. Considering that the LLCs were active ongoing businesses (as opposed to a mere instrumentality – or shell – of Mr. Allard), and there was no allegation that the LLC was used to commit a wrong or a fraud, the Court of Appeals is clearly using this unpreserved legal theory to avoid what they might consider an "unjust" result of the legal decisions the court had already made – that the agreement was not unconscionable and was not the product of fraud or duress. In so doing, they have dispensed with the first two qualifiers of their own legal standard for piercing the corporate veil and have allowed LLC assets to be attached on the basis of the third standard, albeit in an unstated way.

Membership in an LLC may be owned by individuals, or by husband and wife jointly. MCL 450.4504(1). Mr. Allard and his accountant testified without contradiction that the LLCs were created as single-member LLCs and held solely by Mr. Allard (testimony of Earl Allard, Tr 8/18/2011 pp 13-15, Appx 108a-110a; testimony of accountant James R. Graves, Tr 8/17/2011 p 73, Appx 103a). However, while Mr. Allard owned the LLC, neither he nor Mrs. Allard owned the property owned by the LLC. See MCL 450.4504(2) ("A member has no interest in specific limited liability company property"); *Vanderwerp v Plainfield Twp*, 278 Mich App 624, 630; 752 NW2d 479 (2008). In this way, it is similar to stock ownership. If Mr. Allard had owned Ford Motor Company stock in his own name, there is no doubt that asset would have remained his separate property under the antenuptial agreement. It makes no difference that the stock may have been worth $10 at one point and $15 later. The value may change, but his ownership interest did not. Moreover, if the Ford Motor Company made good financial decisions and built new profitable factories, Mr. Allard's interest as a stockholder would not have changed. He does not acquire a direct interest in the new factory or the company's increased profits. The decisions

made on behalf of the company will have elevated the value of his shares, but it would not have meant that Mr. Allard purchased or owned new assets. *Allowing defendant to reach the assets of the LLC would be akin to allowing her to reach the assets of Ford without proving any of the elements necessary to pierce the corporate veil.*

Had this issue been properly preserved and briefed at *any* level of the court system, the LLCs would have had an opportunity to move to intervene (or be joined as third-party defendants) so they would enjoy their constitutional right of notice and an opportunity to be heard before having to defend their separate business assets against a presumptive remand order from the Court of Appeals. A divorce court lacks jurisdiction over property not owned by the parties.[10] See *Moore v Moore*, 482 NE2d 1176, 1179 (Ind App 1985) (automobile not owned by either party could not be included in marital property to be divided); *Dunnagan v Dunnagan*, 239 SW3d 181, 188 (Mo App 2007) (error to award an interest in a company vehicle driven by husband but titled in name of son's corporation). This same rule applies when one of the parties to the divorce is the sole shareholder of the company. *Penn v Penn*, 655 SW2d 631, 632 (Mo App 1983). Property of third persons is not marital property even if an antenuptial agreement does not exist.

Mr. Allard owns the membership of the LLC (or, by comparison, the shares of a corporation) in his own name, which should "unambiguously" (using the Court of Appeals' own conclusion, Opinion, p 11, Appx 77a) exclude the transaction from the scope of marital assets under the antenuptial agreement. The Court of Appeals was correct when it determined that assets acquired by the LLC during its lawful business are actually owned in the name of the LLC. The proofs at trial confirmed that real property was purchased by the LLCs in their own

[10] This issue of personal jurisdiction would have been raised earlier had this issue been asserted at any time before the Court of Appeals' written Opinion.

names (Tr 8/18/2011 pp 35-37, 49-52, Appx 111a-113a, 125a-128a). The Court erred, however, when it concluded that assets owned in the name of the LLC are (or could be) marital assets. That decision does not conform to the antenuptial agreement, and it dishonors the legal protection LLCs enjoy as separate legal entities. From the perspective of the marriage, Mr. Allard's ownership of the LLC membership in his *own individual name* triggered the application of the unambiguous provision in the antenuptial agreement. Even if the value of his membership increased, ownership of his membership remained in his individual name.

B. Income was never an issue at trial

The Court of Appeals also applied a similar rationale to income earned by Mr. Allard during the marriage, ruling that "income" was not an "asset" as defined in the antenuptial agreement and that it therefore could be considered marital property. This is erroneous for the simple fact that his income was earned in his name, and remained in his name (often remaining in the companies to fund operations or expansion). It was therefore an asset in his individual name and, like in the *Reed* case,[11] it remained separate property for purposes of the agreement. The fact that it was earned in an individual name and used to purchase physical assets in an individual name does not convert it to a marital asset. The Court of Appeals specifically noted that the record "is insufficient for us to make definitive rulings regarding the extent of plaintiff's earnings to be treated as marital income" (Opinion, p 16, Appx 82a). The reason for this insufficiency is simple: it was never an issue at trial or in the Court of Appeals. The trial court allowed defendant wide latitude to explore these issues (see Tr 8/17/2011 pp 35-38, Appx 98a-101a), but defendant simply did not have the necessary proofs to sustain any position (let alone the one the Court of Appeals has created for her). See Tr 8/17/2011 p 19, Appx 97a.

[11] *Reed v Reed*, 265 Mich App at 145.

The Court of Appeals decision turns all preservation requirements on their head.[12] That court has reinterpreted both the antenuptial agreement *and* the trial to serve some higher view of equity, contrary to the warning in *Reed* that the judiciary should refrain "from substituting their own subjective views of 'fairness' contrary to an express written agreement." *Reed v Reed*, 265 Mich App at 144. It has raised objections where none were presented, and misinterpreted facts where the defendant herself admitted she had none in support.

C. There was no error in the distribution of the marital home

Finally, the leave order instructed the parties to include the treatment of the marital home in their briefs. The marital home (on Bedford in Grosse Pointe Park) was awarded to Mr. Allard (Judgment of Divorce, ¶ 30(B)(i), p 8, Appx 62a).[13] That home was purchased by plaintiff in his sole name before marriage (Tr 8/18/2011 pp 28-29), and the trial court so found (Opinion and Order dated 11/18/2011, p 4, Appx 37a). It was disclosed as part of the antenuptial proposal (Tr 8/18/2011 p 29; Exhibit A to Antenuptial Agreement, Appx 26a).

The home was unambiguously expected to be covered by the antenuptial agreement and was disclosed. There is no authority to convert this pre-marital sole asset into a joint marital asset, and the circuit court and Court of Appeals properly refrained from doing so.

[12] Appellant concedes that courts have some limited powers to waive preservation requirements when justice requires. "Justice," like "fairness," is in the eyes of the beholder. It is precisely these types of vagaries about exceptions to the rules and exceptions to the exceptions that prompt parties to attempt to resolve their future disputes via the certainty of contracts.

[13] At the time of the divorce, Mr. Allard was living elsewhere, and Mrs. Allard was residing in the home with the children. Trial court's Opinion and Order dated 11/18/2011, pp 3-4, Appx 36a-37a.

D. Conclusion

The Court of Appeals raised its issue *sua sponte* in a published opinion that will guide the bench and bar. The Opinion upsets the sanctity of antenuptial agreements (while proclaiming to uphold their enforceability) and casts great doubt on the independent legal status of limited liability companies. It should be reversed. This Court may wish to provide guidance about the proofs necessary to pierce the corporate veil and formally adopt the Court of Appeals' formula, see, e.g., *Foodland Distr v Al-Naimi*, *supra*, but it would be unjust to compel these parties to develop those standards and incur the costs of examining the history of the LLCs in this case (including expert witness costs) when this was never an issue raised by either party and defendant never alleged or proved any element necessary to pierce the corporate veil.

CONCLUSION

This case offers the interesting question about what happens when an antenuptial agreement is found to be valid. Does its validity matter? Defendant would argue that a valid contract with, essentially, a liquidated damages provision does not affect the proofs at trial, and would enable a party to seek a different measure of relief. The circuit court correctly determined that the contract was valid and that it controlled the outcome of the case. The court did not err by enforcing the unambiguous language of the antenuptial agreement, and by limiting trial testimony to conform with that ruling.

Moreover, the circuit court did not err in the manner it applied MCL 552.401 and MCL 552.53. Even if those statutes were to apply, the court made adjustments in recognition of the financial disparity of the parties.

The Court of Appeals properly upheld the antenuptial agreement and the application of the two statutes involved. It erred, however, when it stated that property owned by the LLCs was subject to treatment as marital assets. The remand order and the Opinion's treatment of income and LLC assets should be vacated.

PRAYER FOR RELIEF

Plaintiff-Appellee Earl H. Allard, Jr., prays that this Court affirm the judgment of the circuit court and vacate that portion of the Court of Appeals' Opinion remanding the case for further proceedings.

Respectfully Submitted,

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